No. 357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

ALAMO EXPRESS, INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., and SOUTHWESTERN MOTOR TRANSPORT, INC., *Appellants*

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and CENTRAL FREIGHT LINES INC., W. W. CALLAN and INLAND MOTOR FREIGHT LINES, INC., *Appellees*

On Appeal From The United States District Court for the Western District of Texas, San Antonio Division

Brief Opposing Motion of Appellees to Affirm

This Reply by Appellants to Motion to Affirm by Appellees Central Freight Lines Inc. and W. W. Callan is filed pursuant to Rule 16.3 of the Revised Rules of this Court.

STATEMENT

Appellants' JURISDICTIONAL STATEMENT at pps. 6-25 fully describes the Statement of the Case herein. The pertinent Commission rules, statutes, decision of the court below, and reports and orders of the Commission complained of and prior thereto, are

included in Appendices A and B of Appellants' JURISDICTIONAL STATEMENT.

The Motion to Affirm filed by Appellees Central Freight Lines, Inc. and W. W. Callan urges as grounds therefor only one subsidiary point dealt with in Appellants JURISDICTIONAL STATEMENT, that the subsequent action of Appellee Interstate Commerce Commission in accepting for filing Central's second petition for reconsideration, in reopening the "control" case, and in granting same after prior effective denial "presents no substatnial issue warranting plenary consideration." This conclusion is urged solely on the basis of the contention that the Commission's long established policy and doctrine of denial of "split-offs" of intrastate and coextensive interstate operating rights is properly subject to an exception herein because applicants "were not offending parties." Such motion wholly fails to treat with or consider the other grounds in Appellants' JURISDICTIONAL STATEMENT submitted as substantial grounds for consideration of this case by this Court:

(1) The Commission in a prior decision *(Yellow Transit Freight Lines, Inc.-Purchase (Portion)-Inland Motor Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 MCC 775) refused to authorize transfer of the identical "split-off" rights to another carrier where applicants were "not offending parties." Even though the doctrine of stare decisis is not applicable, such action by the Commission in adopting different standards for different applicants in the same situation is to act arbitrarily. *National Labor Relations*

Board v. Mall Tool Co., 119 F. 2d 700; *Tallman v. Udall*, 324 F. 2d 411; *Dixie Highway Express, Inc., et al. v. United States, et al.* ___ F. Supp. ___.

(2) The order of the Commission of July 23, 1963 was a final order, as defined in 49 U.S.C. §17(9), and the jurisdiction of the Commission in the "control" case was terminated by the entry of such order. While conceivably the Commission *on its own motion* might reopen such proceeding otherwise final, the vice herein was in the reopening after finality upon the successive petition of a party, violative of the Commission's own rules.

(3) While the Commission waived its Rule 1.101 (e) permitting of the late filing of applicants' second petition, which action was arbitrary, capricious, and void, nevertheless, it did not waive, nor was waiver sought of, its own Rule 1.101(f), prohibiting the entertainment of a successive petition for reconsideration upon substantially the same ground as a former petition which had been denied by the Commission. Thereby, the orders complained of herein are nullities in law.

(4) Although the Commission waived its Rule 1.101(e) on motion of applicants and permitted of the late filing of a petition for reconsideration, the Commission did not waive, nor was waiver sought by applicants of, its Rule 1.101(a)(3) with respect to the administrative finality of the order of July 23, 1963 denying such "control" application. While conceivably the Commission might have opened such administratively final order on its own motion [*Baldwin v. Scott*

County Milling Co., 307 U.S. 478 (1939); *Sprague v. Woll*, 122 F. 2d 128 (7th Cir. 1941), Cert. denied 314 U.S. 669; and *Erie R. R. Co. v. United States*, 59 F. Supp. 743, 64 F. Supp. 162 (S. D. Ohio 1945)], the Commission may grant the application for reconsideration of applicants, under 49 U.S.C. §17(6) only under "such general rules as the Commission may establish," and where, as here, the application for rehearing was granted in violation of the Commission's Rules 1.101(a)(3), 1.101(e), and 1.101(f), the orders here complained of issued in contravention of such statute and such rules are nullities in law.

(5) The orders of the Commission of June 29, 1964 and October 20, 1964 are arbitrary, unreasonable, capricious, void, and constituted an abuse of discretion by the Commission, because:

(a) There had been an objectionable split-off of interstate and intrastate rights, which resulted in the creation of duplicate operating rights, and as a result thereof, the approval of the control of the operating rights herein would require proof of public convenience and necessity.

(b) There was no substantial evidence to support the finding that the operating rights sought to be controlled were not dormant.

(c) The grant of authority was not properly conditioned upon the cancellation of all operating authority sought to be controlled, except between San Antonio, Houston, Corpus Christi, Bishop, and Aransas, Texas.

(d) Total dormancy of the operating rights sought to be controlled existed as a matter of law.

(e) The grant was not conditioned upon the cancellation of rights sought to be controlled which are duplicative with those of Central Freight Lines, Inc., Southwestern Motor Transport, Inc., and Alamo Express, Inc., although applicants agreed thereto.

(f) They are predicated upon an inferential representation by Central Freight Lines Inc. that it would be successful in its lawsuit pertaining to the acquisition of control of Alamo Express, Inc., whereas in *Walker v. Central Freight Lines, Inc.*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), Writ Denied, N.R.E., the issue of the acquisition of control by Central of Alamo Express has been finally adjudicated against Central by the Texas courts.

(g) They are predicated upon representation that there is no market for the interests unlawfully acquired in the carrier sought to be controlled, although there is no evidence with respect thereto, nor as to what efforts have been made to market such interests.

(h) They are predicated upon a finding relative to negotiations relating to purchase of reversionary rights of the split-off intrastate rights coextensive with the interstate rights sought to be controlled, but there is no evidence with respect thereto.

(i) Applicants did not establish the statutory criteria required by 49 U.S.C. §5 for the approval of the control application, including failure to establish among other things, that the transaction is consistent with the public interest, that the effect of the proposed transaction upon adequate transportation service to the public, that the total fixed charges resulting will not burden Central or Inland, that the interest of carrier employees will not be affected, or that full utility has been made of all operating rights. The record before the Commission was silent with respect to these requisite matters of proof.

It is manifest that the questions on which the decision of this cause depends are so substantial as to require further consideration by this Court.

WHEREFORE, Appellants pray that Appellees' Motion to Affirm be denied and that this Court enter an appropriate order noting probable jurisdiction and that the case shall stand for argument.

Respectfully submitted,

REAGAN SAYERS
303 Century Life Bldg.
Fort Worth, Texas 76102

EWELL H. MUSE, JR.
415 Perry Brooks Bldg.
Austin, Texas 78701
Counsel for Appellants

RAWLINGS, SAYERS, SCURLOCK & EIDSON
Of Counsel

CERTIFICATE OF SERVICE

I certify that I have served copy of the foregoing on all parties of record in the District Court by depositing a copy properly addressed with proper postage affixed in the U.S. mail.

Dated at Fort Worth, Texas this 18th day of August, 1965.

Reagan Sayers